Elias bin Idris v Mohd Syamsul bin Md Yusof & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IPCV)(W)508–03 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
29 MARCH 2018

Copyright — Literary works — Infringement — Appellant author of novel sued respondents for infringing his copyright in the novel by copying his novel for a movie — Whether striking similarities between the novel and movie could not be passed off as mere coincidence — Whether careful comparison showed the movie substantially copied novel — Whether appellant had shown causal connection between the novel and the movie as novel freely available to the public before the movie was made — Whether appellant's allegations on his blog that respondents had copied his novel for their movie was justified and could not amount to defamation of the respondents

The appellant was the author of a novel titled 'Aku Bohsia' ('the novel') which was published in 1995. The first respondent was the lead actor, lead scriptwriter and director of a movie titled 'Bohsia: Jangan Pilih Jalan Hitam' ('the movie') which was released in 2009. The movie was produced by the second respondent and distributed by the third respondent. The appellant sued the respondents for infringing his copyright in the novel after finding that, inter alia, in theme, plot, characters and message, the movie was substantially the same as his novel. In his statement of claim, the appellant set out the several significant similarities between his novel and the movie. The respondents denied the appellant's claim and said they had never read or heard of the novel and that any similarities between the movie and the novel were purely coincidental as the subject-matter of 'bohsia' girls and 'mat rempit' were matters within the common knowledge of the population. The respondents counterclaimed against the appellant for damages for defamation over two articles he had written on his blog alleging that the respondents had copied his novel for the movie. The High Court dismissed the appellant's claim, allowed the respondents' counterclaim and awarded them RM100,000 in damages. The trial judge found that any similarities between the novel and the movie was not the result of copying; that the issues dealt with had been endemic in the country since before the novel came into being and were 'commonplace, unoriginal or consisted of general ideas' over which the novel could not claim exclusive 'ownership'. The trial judge also found that the appellant failed to prove a causal connection between the novel and the movie to show that the movie was copied from the novel. The appellant appealed against both the dismissal of his claim and the allowing of the counterclaim.

Held, unanimously allowing the appeal, setting aside all orders made by the High Court, granting the reliefs sought by the appellant in his statement of claim and ordering general damages payable to him to be assessed:

(1) On a careful comparison of the similarities enumerated in para 10 of the appellant's statement of claim, it was apparent that there was substantial similarity between the novel and the movie that could not be written off as mere coincidence (see para 33).

(2) While the 'bohsia' phenomenon was a social ill that was prevalent in the 1990s and the issue of 'mat rempit' remained a social issue till today, the similarities between the novel and the movie were so numerous and related not just to the general theme, plot, names of characters and places, but more importantly, character traits — even specific events and relationships in the lives of the characters, that cumulatively could not be termed as 'commonplace, unoriginal or consist of general ideas'. The inescapable conclusion was that the movie had copied the novel. In the light of the numerous and significant similarities, the court was not persuaded by the respondents' contention that the similarities were only similarities in ideas which was not protected by s 7(2A) of the Copyright Act 1987 ('the CA 1987'). Neither could they be termed as commonplace general ideas or mere coincidences (see paras 34–35).

(3) The trial judge erroneously found that the appellant had failed to show a causal connection between the novel and the movie because 'there was no evidence on the sale of the novel, the number of copies that were sold or whether the novel was still in the market, 14 years later'. Evidence of a causal connection could be established directly or indirectly. In the instant case, it was indirect in that the novel had been published and was available to the public. The respondents could have had prior access to the novel. Even if it was no longer in the market, the novel could still presumably have been available in libraries and bookstores. If the court were to give a restrictive meaning to 'causal connection', as the trial judge had done, it would leave a lot of original works unprotected, which was clearly not intended by the CA 1987 (see paras 38–39).

(4) In arriving at her decision, the trial judge had placed undue reliance on irrelevant considerations, such as the 14-year gap between the publication of the novel and the release of the movie and the fact that the appellant had only commenced his suit five years after the movie was released. Pursuant to s 18 of the CA 1987, the duration that was protected by copyright was 50 years from the date of publication (see para 37).

(5) In the light of the finding that the respondents had infringed the appellant's copyright in his novel, his allegation in his blog that his work

had been copied by the respondents was protected by the defence of justification. Accordingly, the respondents' counterclaim for defamation was not sustainable (see para 40).

[Bahasa Malaysia summary

Perayu adalah penulis novel bertajuk 'Aku Bohsia' ('novel tersebut') yang diterbitkan pada 1995. Responden pertama adalah pelakon utama, penulis skrip utama dan pengarah filem bertajuk 'Bohsia: Jangan Pilih Jalan Hitam' ('filem tersebut') yang dikeluarkan pada 2009. Filem tersebut telah diterbitkan oleh responden kedua dan diedarkan oleh responden ketiga. Perayu telah menyaman responden-responden kerana melanggar hak ciptanya dalam novel tersebut selepas mendapati bahawa, antara lain, tema, plot, watak-watak dan mesej, filem tersebut amat sama dengan novelnya. Dalam penyataan tuntutannya, perayu telah menyatakan beberapa persamaan yang ketara antara novelnya dan filem tersebut. Responden-responden menafikan dakwaan perayu dan mengatakan mereka tidak pernah membaca atau mendengar tentang novel tersebut dan bahawa apa-apa persamaan antara filem tersebut dan novel terebut hanyalah kebetulan semata-mata kerana hal perkara budak perempuan 'bohsia' dan 'mat rempit' adalah perkara-perkara dalam pengetahuan am tentang penduduk. Responden-responden telah menuntut balas terhadap perayu untuk ganti rugi kerana fitnah ke atas dua artikel yang ditulisnya di blognya yang mengatakan bahawa responden-responden telah meniru novelnya untuk filem tersebut. Mahkamah Tinggi telah menolak tuntutan perayu, membenarkan tuntutan balas responden-responden dan mengaward mereka ganti rugi RM100,000. Hakim perbicaraan mendapti bahawa apa-apa persamaan antara novel tersebut dan filem tersebut bukanlah akibat meniru; bahawa isu-isu yang ditangani telah endemik dalam negara sejak sebelum novel tersebut wujud dan adalah 'commonplace, unoriginal or consisted of general ideas' yang mana novel tersebut tidak boleh menuntut 'ownership' eksklusif. Hakim perbicaraan mendapati bahawa perayu telah gagal untuk membuktikan kaitan kausal antara novel tersebut dan filem tersebut untuk menunjukkan bahawa novel tersebut telah ditiru daripada novel itu. Perayu telah merayu terhadap kedua-dua penolaka tuntutannya dan membenarkan tuntutan balas.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan semua perintah dibuat oleh Mahkamah Tinggi, memberikan relief-relief yang dipohon oleh perayu dalam penyataan tuntutannya dan memerintahkan ganti rugi am kena dbayar kepadanya ditaksir:

(1) Berdasarkan perbandingan teliti berhubung persamaan yang disebut dalam perenggan 10 penyataan tuntutan perayu, ia adalah jelas bahawa terdapat persamaan ketara antara novel tersebut dan filem tersebut yang tidak boleh dianggap sebagai kebetulan semata-mata (lihat perenggan 33).

(2) Tatkala fenomena 'bohsia' adalah penyakit sosial yang berleluasa pada tahun 1990-an dan isu 'mat rempit' masih penyakit sosial sehingga kini, persamaan antara novel tersebut dan filem tersebut terlalu banyak dan bukan sahaja berkaitan tema am, plot, nama watak-watak dan tempat, tetapi lebih penting lagi, ciri-ciri watak — malah kejadian dan hubungan spesifik dalam hidup watak-watak itu, yang tidak boleh secara kumulatif diungkapkan sebagai 'commonplace, unoriginal or consist of general ideas'. Kesimpulan yang tidak dapat dielakkan adalah bahawa filem tersebut telah meniru novel tersebut. Berdasarkan pelbagai dan persamaan yang ketara, mahkamah tidak diyakini oleh hujah responden-responden bahawa persamaan tersebut hanya merupakan persamaan dalam idea yang tidak dilindungi oleh s 7(2A) Akta Hakcipta 1987 ('AHC 1987'). Ia juga tidak boleh disebut sebagai idea am yang lazim atau kebetulan semata-mata (lihat perenggan 34–35)

(3) Hakim perbicaraan terkhilaf apabila mendapati bahawa perayu telah gagal menunjukkan kaitan kausal antara novel tersebut dan filem tersebut kerana 'there was no evidence on the sale of the novel, the number of copies that were sold or whether the novel was still in the market, 14 years later'. Keterangan suatu kaitan kausa boleh dibuktikan secara langsung dan tidak langsung. Dalam kes ini, ia adalah tidak langsung di mana novel tersebut telah diterbitkan dan boleh didapti oleh orang ramai. Responden-responden mungkin telah mempunyai akses terdahulu kepada novel tersebut. Jikapun ia tiada lagi di pasaran, novel tersebut masih booleh dianggap boleh didapati dalam perpustakaan dan kedai buku. Jika mahkamah memberikan maksud terhad kepada 'causal connection', sepertimana yang dilakukan oleh hakim, ia akan menyebabkan banyak kerja asal tidak dilindungi, yang mana adalah jelas bukan diniatkan oleh AHC 1987 (lihat perenggan 38–39).

(4) Dalam membuat keputusannya, hakim perbicaraan telah meletakkan kebergantungan yang tidak wajar keatas pertimbangan yang tidak relevan, seperti jurang 14 tahun antara peneribitan novel tersebut dan tayangan filem tersebut dan fakta bahawa perayu telah hanya memulakan guamannya lima tahun selepas filem tersebut ditayangkan. Menurut s 18 AHC 1987, tempoh yang dilindungi oleh hak cipta adalah 50 tahun dari tarikh penerbitan (lihat perenggan 37).

(5) Berdasarkan dapatan bahawa responden-responden telah melanggar hak cipta perayu dalam novelnya, dakwaannya dalam blognya bahawa kerjanya telah ditiru oleh responden-responden adalah diindungi oleh pembelaan justifikasi. Sewajarnya tuntutan balas responden-responden untuk fitnah tidak boleh dikekalkan (lihat perenggan 40).]

Notes

For cases on infringement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 8174–8148.

Cases referred to

Designers Guild Ltd v Russel Williams (Textiles) Ltd (trading as Washington DC) [2000] 1 All ER 700; [2000] 1 WLR 2416, HL (refd)

Kiwi Brand (M) Sdn Bhd v Multiview Enterprises Sdn Bhd [1998] 6 MLJ 38; [1998] 1 MLRH 116, HC (refd)

Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise) [2009] 3 MLJ 525; [2009] 2 MLRH 82, HC (refd)

Saleha Hussin lwn Ab Wahid Nasir & Yang Lain [2004] 2 MLRH 19, HC (refd)

The New Straits Times Press (M) Bhd & Anor v Admal Sdn Bhd [2013] 6 MLJ 405, CA (refd)

Legislation referred to

Copyright Act 1987 ss 3, 7(2A), (3), 18, 36(1)

K Periasamy (Periasamy & Co) for the appellant.
Aizul Rohan bin Anuar (Chambers of Saiful Dzulhelmi) for the respondent.

Badariah Sahamid JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge who on 16 February 2016 dismissed the plaintiff's claim against the defendants for copyright infringement, and allowed the defendant's counterclaim against the plaintiff for defamation.

[2] For ease of reference parties will be referred to as they were in proceedings before the High Court.

BACKGROUND FACTS

[3] A summary of the background facts with suitable modifications is extracted from the learned judge's 'grounds of judgment'.

[4] The plaintiff is the author of the novel titled, 'Aku Bohsia' ('the novel'). The novel was published in 1995 by Kreatif Akademik of Klang. The plaintiff claims to be the copyright owner of the said novel which is protected by the Copyright Act 1987 ('the CA 1987').

[5] The first defendant is the lead actor, lead scriptwriter and director of the movie, 'Bohsia: Jangan Pilih Jalan Hitam' ('movie'). Apart from this movie, the first defendant is also the scriptwriter and director of other Malay movies on various themes.

[6] The second defendant is the producer of the movie. He is also the father of the first defendant.

[7] The third defendant is the distributor of the movie.

[8] PW1 and PW2 who are both children of the plaintiff gave evidence that they had watched the movie around April 2009 and found the movie to be similar to their father's novel. They informed their father, the plaintiff, who then watched the movie and found the movie to be similar with his novel.

[9] The plaintiff subsequently approached the defendants, who denied copying the plaintiff's novel. The first defendant, the scriptwriter of the movie claimed that he had never read the novel before directing the movie. The first defendant also claimed that the movie is based on one of our social problems, the issue of 'bohsia'.

THE PLAINTIFF'S CLAIM

Copyright infringement

[10] The plaintiff filed this suit in November 2014, and claimed that the movie, 'Bohsia: Jangan Pilih Jalan Hitam' had lifted, utilised, copied and plagiarised the contents, theme, plot, characters and message in his novel, 'Aku Bohsia' to create, develop, produce, present and distribute the movie, 'Bohsia: Jangan Pilih Jalan Hitam'.

[11] The plaintiff claims that the defendants' actions abovementioned were without the plaintiff's consent, knowledge, approval and permission and had thus infringed and violated the plaintiff's copyright.

[12] The details of the alleged infringements are pleaded in the plaintiff's statement of claim dated 25 November 2014 in para 10. A summary of the alleged infringements (English translation) are as follows:

(a) theme

Both the novel and the movie have the same or similar theme of young girls referred to as 'bohsia', who are sexual victims and their involvement with 'Mat rempit', motorcyclists who are often involved with illegal racing;

(b) plot

Both the novel and the movie contain the same or similar plots of two main characters ('bohsia girls') who became 'bohsia' after being raped by their own fathers and as a result of being influenced by their peers in a negative way;

(c) message

(i) in both the novel and movie, the same or similar message conveyed was to urge society to sympathise with these 'bohsia' girls, to urge society to overcome this social ill as well as to find means to rehabilitate both the 'bohsia' girls as well as the 'Mat rempit'. Attention is also drawn to certain parties who take advantage of them, in particular the pimps ('bapa/ibu ayam') who would prostitute these 'bohsia' girls; and

(ii) both the novel and the movie also focus on the vices of drug abuse, gambling, alcoholism, illegal racing and the effects of the abovementioned vices;

(d) characters

(i) in the novel, the two main 'bohsia' characters are called 'Anne Natasha' and 'Syima'. The two 'Mat rempit' characters who frequently race illegally are called 'Jeff' and 'Burt'. The other main character is a lady pimp who prostitutes the 'bohsia' girls. The character of the father is that of an alcoholic who raped his own daughter;

(ii) in the movie, the two main 'bohsia' girls are called 'Amy' and 'Tasha', while the two 'Mat rempit ' characters are called 'Mus' and 'Acai'. The movie also features the character of a male pimp. The character of the father is similarly that of an alcoholic who had raped his own daughter; and

(iii) both the novel as well as the movie feature characters with the common traits of being quarrelsome as well as hot tempered (the character of Jeff in the novel and the character of Acai in the movie)

(e) significant similarities:

(i) in the novel the father who is an alcoholic and a gambler rapes his own daughter and is irresponsible. Similarly, in the movie, the character of the father rapes his own daughter. He is similarly an alcoholic, a gambler and is irresponsible;

(ii) sexual scenes of the main 'bohsia' character. In the novel, Anne Natasha who was drunk only recovered consciousness at 4am to discover that all the 'Mat rempit' had had sexual relations with her. Whereas in the movie, Tasha who was a drug addict had sexual relations with all the 'Mat rempit' at a rented house;

(iii) in the novel, Anne Natasha attends a 'tea dance' with the intention of attempting to drink alcohol. While in the movie, Tasha goes to a disco with the same intention of attempting to drink alcohol;

(iv) in the novel, Anne Natasha who does not go to school returns home late is scolded and slapped by her parents. Anne Natasha herself had seen her own mother come out of a hotel in Bukit Bintang with a man who was not her father. In the movie, Tasha is evicted from her home by her own mother who threw out her belongings, yet her own mother brings home other men; and

(v) in the novel, the popular meeting place for the 'bohsia' girls and their 'Mat rempit' friends is around the Bukit Bintang area. Other locations include Dayabumi and the area behind the Federal Court building. Similarly, in the movie the 'Mat rempit' group had got into a fight in front of Lot 10 in the Bukit Bintang area. The 'Mat rempit' and 'bohsia' meeting grounds are the areas in the vicinity of the Federal Court building opposite Dataran Merdeka.

THE DEFENCE

[13] The defence of the defendants may be summarised as follows:

(a) the defendants had never read or purchased or heard of or been informed of the plaintiff's novel;

(b) there are significant dissimilarities between the novel and the movie. (refer to para 5 at pp 3–20 of the defence);

(c) any similarities between the novel and the movie are only coincidental because they are premised on common social problems which is well known through the mass media such as newspapers, television dramas as well as films; and

(d) the similarities between the novel and the movie are similarities of ideas and not protected under s 7(2A) of the CA 1987.

THE DEFENDANTS' COUNTERCLAIM

Defamation

[14] The defendants had mounted a counterclaim that the plaintiff's blog on the internet at http://ikanlepu.blodspot.com/2014archive.html under the heading 'Elias Hj Idris, Mendepani Masa Depan' dated 7 November 2014 with reference to 'Pengarah Muda Filem Bakal disaman' is defamatory. In addition, another of the plaintiff's blog on the internet at http://ikanlepu.blodspot.com/2014archive.html under the heading 'Elias Hj Idris, Mendepani Masa Depan', dated 16 November 2014, with reference

to 'AKU BOHSIA', *Sebuah Karya Sastera* (novel) is also defamatory. A

Agreed Issues before the High Court

[15] The issues in the plaintiff's claim and the defendants' counterclaim may be summarised as follows: B

(a) whether the defendants have used, copied, lifted and plagiarised the contents of the plaintiff's novel entitled, 'AKU BOHSIA', to create, develop, produce, present and distribute the film, 'BOHSIA: JANGAN PILIH JALAN HITAM'; C

(b) whether the defendants' said action as referred to above had infringed and violated the plaintiff's copyright to his said novel and had caused loss and damage to the plaintiff? and

(c) whether the plaintiff's blogs on the internet, details as abovementioned, are defamatory? D

THE FINDINGS AND DECISION OF THE HIGH COURT

[16] The learned High Court judge had dismissed the plaintiff's claim on copyright infringement and allowed the defendants' counterclaim for defamation. The grounds of decision of the learned judge may be summarised as follows. E

Copyright infringement F

[17] The learned judge made a finding that the novel of the plaintiff was an original piece of work and that the plaintiff is the owner of the copyright in the novel, 'AKU BOHSIA'.

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[18] However, the learned judge found that the similarities alleged between the plaintiff's novel and the defendants' movie was not the result of copying or substantial reproduction of the plaintiff's novel, '... because they are commonplace, unoriginal, or consists of general ideas' (*Designers Guild Ltd v Russel Williams (Textiles) Ltd (trading as Washington DC)* [2000] 1 All ER 700; [2000] 1 WLR 2416 at p 2425; *The New Straits Times Press (M) Bhd & Anor v Admal Sdn Bhd* [2013] 6 MLJ 405). H

[19] In the learned judge's view, both the novel and the movie are about the life of a 'bohsia'. The issues of 'bohsia' girls, and the surrounding issues such as 'Mat rempit', drug abuse, alcoholism, gambling and illegal racing were social problems that were prevalent before 1995 when the novel was first published and persisted after the screening of the movie in 2008, and until today. Thus I

these were elements which are already in the public domain and cannot be considered as exclusive to the plaintiff's novel. At para 43 of her grounds of judgment, the learned judge had stated thus:

> 'Bohsia' and its related social problems and common features are already part of our society before the publication of the plaintiff's novel in 1995 and persisted until today. All these elements associated with 'bohsia', which are part of our social problems, are therefore information that is both commonplace and general ideas in our society that cannot form part of the comparison between the novel and the movie. The 'bohsia' and 'mat rempit' issues are general issues which are already in public domain that cannot be said to be exclusive only to the plaintiff's novel. The 'bohsia' issue is already a part of our society that it was included in the national dictionary.

[20] The learned judge then proceeded to exclude the general and commonplace elements in society when making comparison between the novel and the movie. What was left for comparison was, in the learned judge's view insufficient to support a copyright infringement. At para 46 of the learned judge's grounds of judgment she had stated as follows:

> As such, and after taking out the ideas and elements associated with 'bohsia', what are left for comparison are the similarities in the scene of the rape of the daughter by her father, the relationship between the daughter and her mother, the names of the character, and the places of gathering of the 'bohsia' and the 'mat rempit' (similarities in item 1/a, 3, 5, 6 and 15). However, I am of the considered opinion that by themselves, they cannot be said to be substantial similarities that goes to the root of the novel and the movie. The root of both the novel and the movie are the social issues surrounding the 'bohsia' and to a lesser extent, the 'mat rempit'.

[21] The learned judge also made a finding that there is no causal connection between the novel and the movie to establish that the movie was copied from the novel. In para 49 and 50 of the learned judge's grounds of judgment, she stated as follows:

> [49] From his witness statement (WSPW5), the plaintiff did not explain the causal connection between the novel and the movie. On this issue I agree with the defendant that the plaintiff has failed to establish the causal connection. The novel was published in 1995, but the movie was released only in 2009, about 14 years later. Yet, the plaintiff only took action in 2014, about five years later. Added to that, there was no evidence on the sale of the novel, the number of copies that was sold or whether the said novel is still in the market, 14 years later.
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> [50] With regards to the plaintiff's reliance of the case of *Saleha*, (*Saleha Hussin lwn Ab Wahid Nasir & Yang Lain* [2004] 2 CLJ 2004) I am of the considered opinion that our factual matrix is different, because in *Saleha*'s case there is a nexus between plaintiff, who is the script writer and had given the script to the defendant. Having access to the plaintiff's script, the defendant has produced the production bearing substantive similarities with the plaintiff's script. On the facts in that case, the court has made a finding of fact on substantive similarities.

Defamation

[22] In respect of the two articles, published on the plainitiff's blog, the learned judge found that the defendants had established their counterclaim against the plaintiff in defamation. At para 58 of her grounds of judgment she stated thus:

> ... I am of the considered opinion that the words are defamatory as they claim that the movie has copied about 80% or 85% of the novel. The articles impute that the defendants lack in integrity and/or dishonourable conduct by copying the novel into their film. This would expose the defendants to ridicule and lower the defendants in the estimation of society.

[23] On the premise that the defendants are well known members of the Malay film industry, and that the allegations on copying affects the defendants' professional reputation and honour, the learned judge awarded the defendants damages in the sum of RM100,000.

The plaintifflappellant's grounds of appeal

[24] The plaintiff's grounds of appeal may be summarised as follows:

(a) the learned judge had erred in her finding that the social problem of 'bohsia' was a prevalent phenomenon in the 1990's but not of today;

(b) the learned judge had failed to appreciate that there were glaring similarities between the novel and the defendants' movie in respect of the theme, character, plot and underlying message. Thus the movie 'Bohsia: Jangan Pilih Jalan Hitam' was not an original work but a copy of the plaintiff's novel, 'Aku-Bohsia';

(c) the learned judge had erred in fact and law in her finding there was no breach of the plaintiff's copyright when the plaintiff had demonstrated that there was substantial copying (80%) of the plaintiff's novel; and

(d) the learned judge had erred in her finding that defamation had been proved against the plaintiff.

OUR DECISION

[25] After careful consideration of learned counsels' oral and written submissions and a perusal of the appeal records, we were of the unanimous opinion that there were merits in this appeal that warrant appellate intervention. Accordingly, we allowed the appeal with costs of RM40,000. We set aside the orders of the learned judge in respect of both causes of action ie infringement of copyright and defamation. We give our reasons below.

[26] It is not disputed that the plaintiff is the author of the novel, 'AKU BOHSIA: JANGAN PILIH JALAN HITAM'. It is also not disputed that the plaintiff's novel is a literary work within the interpretation of s 3 of the CA 1987, which includes novels, and is eligible for copyright protection pursuant to s 7(3) of the CA 1987 which reads as follows:

> A literary, musical or artistic work shall not be eligible for copyright unless:
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> (a) sufficient effort has been expended to make the work original in character, and
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> (b) the work has been written down, recorded or otherwise reduced to material form.

[27] Thus, what is protected by copyright law is the original work of the author. In the case of *Kiwi Brand (M) Sdn Bhd v Multiview Enterprises Sdn Bhd* [1998] 6 MLJ 38 at p 46; [1998] 1 MLRH 116 at p 120, Abdul Malik Ishak J (as he then was) had occasion to consider what is meant by 'original' in s 7(3) of the CA 1987:

> The word 'original' that appears in s 7(3)(a) of the Copyright Act 1987 does not mean that the work must be the expression of original or inventive thought. I am of the considered view that the originality which is required relates to the expression of the thought; it does not require that the expression must be in an original or even novel form. The work must not be copied from another work. It should originate from the author.

[28] In this respect we agree with the learned judge's findings that the plaintiff's novel was 'original' in that the plaintiff was the author of the novel and not copied from another work, and that the plaintiff is the owner of the copyright in the said novel.

[29] The plaintiff's claim against the defendants for copyright infringement is premised on s 36(1) of the CA 1987, which provides as follows:

> 36 Infringements.
>
> (1) Copyright is infringed by any person who does, or causes any other person to do, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act.

[30] In the House of Lords case of *Designers Guild Ltd v Russel Williams (Textiles) Ltd (trading as Washington DC)* [2000] 1 WLR 2416; [2000] 1 All ER 700 at p 708, Lord Millet had succinctly summarised the essential elements in an action for copyright infringement in the following words (the alleged infringement was in respect of the alleged copying of a fabric design):

> The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from

the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal or consists of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

[31] The same elements were also referred to in the Malaysian case of *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise)* [2009] 3 MLJ 525 at p 536; [2009] 2 MLRH 82 at p 88. Justice Low Hop Bing had stated the elements which constitute copyright infringement pursuant to s 36(1) of the CA 1987 in the following way:

> The essential elements constituting copyright infringement have been set out by Sir Rymond Evershed MR in *Purefoy Engineering Co Ltd And Another v Sykes Boxall & Co Ltd And Others* [1955] 72 RPC 89. Prof Dr Khaw Lake Tee adopted these elements in *Copyright Law in Malaysia* (1994) at pp 87 and 88 as follows:
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> For purposes of direct infringement, it must be established that:
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> (a) there is *sufficient objective similarity* between the original work or a substantial part thereof, and the infringing copy;
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> (b) there is a *causal connection* between the original work and the infringing copy, that is, the infringing copy must have been copied from the original work, whether directly or indirectly; and
>
> (c) what has been infringed must constitute a *substantial part of the original work*. (Emphasis added.)

[32] The learned judge had declined to consider the alleged similarities in the plaintiff's evidence (listed as items (2), (7) and (10) (pp 16–19 in the grounds of judgment) as the same had not been pleaded in the statement of claim — see para 26. She then proceeded to consider the other alleged similarities in the statement of claim but disregarded the similarities as copying on the grounds that '… they are commonplace, unoriginal, or consist of general ideas'.

[33] We respectfully disagreed with the abovementioned findings of the learned judge. On a careful comparison of the similarities enumerated in para 10 the plaintiff's statement of claim (translated in para 12 of this judgment), it is apparent that there is a substantial similarity between the

plaintiff's novel and the movie that cannot be written off as merely coincidental. This shows in our considered opinion a clear lack of judicial appreciation by the learned judge.

[34] While the 'bohsia' phenomenon is a social ill that was prevalent in the 1990's and the issue of 'mat rempit' remains a social issue till today, the similarities between the novel and the movie are so numerous and relate not just to the general theme, plot, names of characters and places, but more importantly, character traits — even specific events and relationships in the lives of the characters, that cumulatively cannot be termed as 'commonplace, unoriginal or consist of general ideas'. The inescapable conclusion is that the movie had copied the novel. Some of these similarities were referred to in the statement of claim, in particular the following:

5. Significant similarities

(i) In the novel the father who is an alcoholic and a gambler rapes his own daughter and is irresponsible. Similarly, in the movie, the character of the father rapes his own daughter. He is similarly an alcoholic, a gambler and is irresponsible.

(ii) Sexual scenes of the main 'bohsia' character. In the novel, Anne Natasha who was drunk only recovered consciousness at 4am to discover that all the 'Mat rempit' had had sexual relations with her. Whereas in the movie, Tasha who was a drug addict had sexual relations with all the 'Mat rempit' at a rented house.

(iii) In the novel, Anne Natasha attends a 'tea dance' with the intention of attempting to drink alcohol. While in the movie, Tasha goes to a disco with the same intention of attempting to drink alcohol.

(iv) In the novel, Anne Natasha who does not go to school and returns home late is scolded and slapped by her parents. Anne Natasha herself had seen her own mother come out of a hotel in Bukit Bintang with a man who was not her father. In the movie, Tasha is evicted from her home by her own mother who threw out her belongings, yet her own mother brings home other men.

(v) In the novel, the popular meeting place for the 'bohsia' girls and their 'Mat rempit' friends is around the Bukit Bintang area. Other locations include Dayabumi and the area behind the Federal Court building. Similarly, in the movie the 'Mat rempit ' group had got into a fight in front of Lot 10 in the Bukit Bintang area. The 'Mat rempit' and 'bohsia' meeting grounds are the areas in the vicinity of the Federal Court building opposite Dataran Merdeka.

[35] In the light of the abovementioned numerous and significant similarities between the novel and the movie, we are not persuaded by the defence of the defendants as submitted before us that the similarities pointed out are similarities in ideas, which are not protected by s 7(2A) of the CA 1987.

Neither can they be termed as commonplace general ideas or mere coincidences. A

[36] In the case of *Saleha Hussin lwn Ab Wahid Nasir & Yang Lain* [2004] 2 MLRH 19, the original work was a short story that had been published in a Malay daily. The copied work was a television drama. Justice Abdul Hamid Mohamed, (as he then was) had examined the two works and found (at p 38): B

> ... Adalah jelas bahawa terdapat persamaan substantif antara kedua-dua 'karya' itu. Persamaan yang sebegitu banyak dan penting tidak boleh berlaku secara kebetulan. Ia semestinya disebabkan oleh perbuatan meniru. C

[37] We are also of the considered opinion that in arriving at her decision, the learned judge had placed undue reliance on irrelevant considerations ie the 14 year gap between the publication of the novel in 1995 and the release of the movie in 2009 and that the plaintiff's suit against the defendants was only commenced five years later in 2014. Pursuant to s 18 of the CA 1987, the duration that is protected by copyright is fifty years from the date of publication. D

Section 18 provides as follows: E

> 18 Duration of copyright in published editions
>
> Copyright which subsists in a published edition under this Act shall continue to subsist until the expiry of a period of fifty years computed from the beginning of the calendar year next following the year in which the edition was first published. F

[38] In addition, the learned judge had, erroneously in our opinion made a finding that the plaintiff had failed to demonstrate a causal connection between the original work and the infringing work because, 'there was no evidence on the sale of the novel, the number of copies that was sold or whether the said novel is still in the market, 14 years later'. G

[39] It is worthy of note that evidence of a causal connection can be established directly or indirectly. It is true that in *Saleha*'s case the causal connection was direct in that the original script had been handed to the defendant. In this case, the causal connection is indirect in that the original work had been published and was therefore available to the public. Thus the defendant would have had prior access to the novel. Even if the novel was no longer in the market, it would still presumably be available in libraries and bookstores. If we were to give a restrictive meaning to 'causal connection' as the learned judge did, it would leave a lot of original works unprotected, which is clearly not intended by the CA 1987. H I

[40] In respect of the defendants' counterclaim for defamation: in the light of our finding that the defendants had infringed the plaintiff's copyright to his

novel, the plaintiff's allegation published in his blogs that his work had been copied by the defendant is protected by the defence of justification. Accordingly, the defendants' counterclaim of defamation is not sustainable. We therefore dismissed the order of the learned judge which found the content of the plaintiff's blogs to be defamatory.

[41] In conclusion, we allowed the plaintiff's appeal as well as the appeal against the finding of defamation. We set aside the orders of the learned judge in respect of both the copyright action and defamation. We also grant the plaintiff's prayers 1, 2, 3, 4 and 6 in the statement of claim (pp 3–4 of the appeal records, Part A Vol 1). We also ordered that general damages be assessed by the learned judge. We awarded costs of RM40,000 here and below subject to the payment of allocator. Deposit to be refunded to the appellant.

Order accordingly.

Reported by Ashok Kumar